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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JIMMIE L. BEASLEY - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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June 1, 1987

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QUESTION PRESENTED FOR REVIEW

Is it a denial of a criminal defendant's Fourteenth Amendment Rights of Due Process and Equal Protection of Law, when a Trial Judge reads an indictment to veniremen and the prosecution only lists the Statutory designations of the charges and witnesses, when there is a Criminal Rule which specifically states: "The Attorney for the Commonwealth shall state to the jury the nature of the charge and the evidence upon which he relies to support it"?

In other words, when there is a Criminal Rule which specifically states a Prosecutor must inform the Jury, can a Judge relieve a Prosecutor of that duty without infringing upon the Due Process Right of the Defendant?

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JIMMIE L. BEASLEY - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jimmie L. Beasley, respectfully prays that a Writ of Certiorari issue to review the opinion of the Kentucky Supreme Court entered on April 2, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky reversing Petitioner's conviction is unpublished *Beasley* v. *Commonwealth* (File No. 85-CA-2210-MR) (May 2, 1986) (Appendix to Petition, hereinafter App. pages 1-4). The opinion of the Supreme Court of Kentucky reversing the Court of Appeals on discretionary review is also unpublished (App. pages 5-7).

JURISDICTION

The opinion of the Supreme Court of Kentucky was issued on April 2, 1987. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> . . . nor shall any State deprive any person of . . . liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Kentucky Rule of Criminal Procedure 9.42(a) states:

> The Attorney for the Commonwealth shall state to the jury the nature of the charge and the evidence upon which he relies to support it.

STATEMENT OF THE CASE

This criminal case evolved from a civil action for modification of custody of the complaining witness. [Civil Action No. 12,080-C, 94 and 218]. The complainant wished to live with her natural father and when her natural mother refused to agree the complainant's father instituted a custody change proceeding on or about July 20, 1984. After the paperwork for the custody hearing had been submitted to the Court, the mother (Petitioner's wife) signed an

Agreed Order relinquishing custody to the natural father. However, before the complainant was notified that her mother had voluntarily agreed to allow her to permanently live with her father, the story which resulted in this criminal case was presented to a Social Worker. (Transcript of State Evidence Vol. 11, pages 169-170).

On October 1, 1984, the Hardin Circuit Court, Division I Grand Jury for Hardin County, Kentucky, returned Indictment Number 84-CR-94 against Petitioner, Jimmie L. Beasley. (Transcript of State Evidence, Vol. 1, page 2; Appendix to Petition, App. page 8). This indictment was from a direct submission to the Grand Jury. There were no preliminary inquiries at the District Court level. (Transcript of State Evidence, Vol. 1, page 35). The only witnesses before the Grand Jury were the Complaining witness and the Social Worker. (Transcript of State Evidence, Vol. 1; page 35). Petitioner was indicted for Sexual Abuse in the First Degree; Rape in the Second Degree; and Sodomy in the Second Degree.[1]

When the case was called for trial in April, 1985, the trial Judge read the indictment to the jury pool before voir dire commenced. The Commonwealth began its voir dire and on three separate instances, three jurors were brought to the bench and then excused from serving. The Commonwealth then attempted to reread the indictment to the Jury pool during her voir dire. Trial Counsel objected on the basis of re-

[1]KRS 510.110; KRS 510.050; KRS 510.080.

dundancy and was sustained. The Commonwealth then stated the statutory name for each charge: Rape, Sodomy and Sexual Abuse, then rested. Trial Counsel then commenced his voir dire and again three more jurors were brought up to the bench and questioned. The jury was finally selected and before a recess was taken for in chamber discussion, admonished not to discuss the case. (Transcript of State Evidence, pages 4-29).

After the in-chamber preliminaries were completed, the trial commenced. The Prosecutor gave the following as an opening statement. Because the content of this opening is the subject of this petition, Petitioner will quote in full:

> Mrs. Coleman: Please the Court, Mr. Watson, ladies and gentlemen of the jury. What we have for you today is a most unpleasant case. As a matter of fact, this is probably one of the most unpleasant cases that I will ever have had to try, because the allegations here are very serious, and the testimony that you will hear from Lynn Decker, to me, is very upsetting. Of necessity, because the charges are sexual abuse, sodomy, and rape, we will be using words and language that I was brought up and taught never to use. So I would like to ask, first of all, that you try to prepare yourselves for some language and discussion of things that we don't normally talk about. I would ask you for your patience and your understanding. Because I consider this to be a very important case. Now, because of the type of case that this is, as you might guess, if you think about it, the prosecu-

tion and the defense are not going to have a lot in the way of eye witness testimony. And that's because when somebody rapes a person, or sodomizes a person, or commits sexual abuse, they do not do it in a crowd. So usually you have the two parties — the victim and the perpetrator, the defendant — and you don't have anybody else there watching it. So my witness in chief is going to be the victim. A young lady sixteen years of age, named Lynn Decker, sitting here at the prosecution table. This is going to be very hard for Lynn, and I have talked with her about how we do things here. I am going to make it as easy as I can on her, but I ask for your patience. This is the kind of thing that's embarrassing to discuss, it's upsetting to discuss. If she speaks a little low and you can't hear very well just let us know and we will crank up the microphone and do everything that we can to insure that you hear every bit of this, because every bit of it is going to be very important. I will also have Jane McCormick, who is the sexual abuse expert with the Cabinet for Human Resources. Jane has investigated the case at length. And I am going to have her take the stand and tell you something about sexual abuse of children — what she knows about it, and what she knows about this case as it relates to her background. We have rebuttal witnesses that we may be using later on, but that will be my case in chief, because I don't want to bog you down at the beginning here with a lot of extra information to consider. I just want you to hear what happened. — Thank you. (T.E. I, pages 40-42).

After the close of the Commonwealth's opening statement, trial counsel moved for a "directed verdict of acquittal" on the ground that the opening statement was insufficient. (Transcript of State Evidence, page 43). The Trial Court overruled the motion: "If it is going to be thrown out on that kind of technicality the Court of Appeals will have to do it." (Transcript of State Evidence, page 48). The Trial Judge further added "Whether the Court of Appeals will rule that the Judge advising the jury of the charges relieves the Commonwealth's Attorney of her duty to advise the jury of the charges in this rule, we will have to wait and see." (Transcript of State Evidence, page 49).

The Court of Appeals did reverse the conviction for that very reason. The Court of Appeals, slip opinion at 4 (App. page 4), stated in part:

> Therefore, while a statement of the evidence is not mandatory, the jury, as opposed merely to the veniremen of the jury pool, must be made aware during the opening statement by the Commonwealth of information of a nature such as that contained in the indictment. In this respect, it cannot be assumed that the jurors "comprehend the issue they are sworn to well and truly try." *Galloway* v. *Commonwealth,* 5 KLR 213, 11 Ky. Op. 951 (1883). Hence, the office of an opening statement by a prosecuting officer is to state the nature of the charge against the defendant and the law and evidence relied in support of it and to prepare the minds of the jurors for evidence to be heard. *Mills* v. *Commonwealth,* 310 Ky. 240, 220

S. W. 2d 376 (1949); *Turner* v. *Commonwealth*, Ky., 240 S. W. 2d 80 (1951); *Shepherd* v. *Commonwealth*, Ky., 322, S. W. 2d 115 (1959). The Commonwealth having failed to do more than state the statutory designation of each charge and the names of its witnesses, failed to comply with RCr 9.42.

After granting discretionary review, the Kentucky Supreme Court Reversed:

> "It is the opinion of this Court that the Court of Appeals totally ignored the language of *Calhoun, supra,* at page 224, in which this Court stated:
>
> Since we have concluded that RCr 9.42 was not intended to do more than preserve the necessity of apprising the jury of the nature of the charges, it follows that a statement of the evidence is not mandatory, even though a blindly literal construction would make it so. That such a construction would lead to an entirely impracticable result is an addition basis for our determination that it was not so intended.
>
> "However, it is manifestly clear that the procedure utilized here — viz., the reading of the indictment by the judge and the opening statement itself by the prosecutor — not only apprised the jury of the charges but also included a statement of the evidence."

Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE WRIT

The Opinion Below Conflicts with *United States* v. *Dietrich*[2], *Rose* v. *United States*[3], *Webb* v. *United States*[4] and the Due Process Clause of the United States Constitution as Well as Decisions in Many Jurisdictions. The Present Case Presents an Appropriate Vehicle for Deciding an Important Question of Constitutional Law Regarding Defining the Role of the Prosecutor in Apprising the Jury of the Charges Facing a Defendant and Due Process.

A. THE QUESTION PRESENTED IS NARROW AND PROPERLY BEFORE THE COURT IN AN APPROPRIATE CONTEXT.

This Court is asked to decide whether, as a matter of due process, a prosecutor must inform a jury of the specific charges facing a criminal defendant or if the prosecutor is relieved of this duty when a trial judge reads an indictment although there is a state criminal rule which states that a prosecutor *shall* state the charges. This case is an appropriate vehicle to resolve this important constitutional question by deciding and determining conclusively what role the prosecutor and Judge must play in a criminal trial to apprise the jury of charges facing a defendant so he gets a fair and impartial trial.

The lack of an opening by the Commonwealth prejudiced the Appellant's rights to a fair trial. The jury had no outline of the evidence the Commonwealth

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[2]*United States* v. *Dietrich*, 10 Cir., 126 F. 676.

[3]*Rose* v. *United States*, 149 F. 2d 755 (1945).

[4]*Webb* v. *United States*, 191 F. 2d 512 (1951).

would have to present in order to convict the defendant. The jury needed the outline of the charges against the accused and the law and the facts that the prosecution would rely upon to support their case. This the jury needs so they will understand testimony as it falls from the lips of witnesses. Criminal Code Procedures § 220, *Turner* v. *Commonwealth,* Ky., 240 S. W. 2d 80 (1951).

The record in this case is an appropriate context in which to address this issue because the federally constitutional question was properly presented below and was directly addressed by both Kentucky's appellate Courts.

Another reason why this case is an appropriate vehicle to decide this question is that the facts illustrate a situation where if a jury is not specifically informed of the charges facing a defendant and what elements must be proven by the Commonwealth, the emotion and public outcry against this type crime will alone convict the defendant.[5]

B. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

The Due Process Clause of the Fourteenth Amendment guarantees trial by an impartial jury in state

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[5]As stated in *Carrier* v. *Commonwealth,* Ky. 356 S. W. 2d 752 (1962) since the time Lord Hale, admonished, "it must be remembered that this is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent."

criminal prosecutions. *Duncan* v. *Louisiana,* 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 491 (1968).

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent jurors . . . A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as indifferent as he stands unsworn. Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial." *Irwin* v. *Dowd,* 366 U. S. 717, 722; 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751, 755 (1961).

In *United States* v. *D'Alora,* 585 F. 2d 16 (1978) it was stated by this court that the prosecutor has a duty to "outline the evidence fairly for each count in the indictment"

When specific guarantees of the Bill of Rights are involved, the United States Supreme Court takes special care to assure that prosecutional conduct in no way impermissibly infringes them. *Donnelly* v. *DeChristoforo,* 416 U. S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868.

There is no question of the power of a trial court to direct a verdict upon the opening statement of counsel. *Best* v. *District of Columbia,* 291 U. S. 411, 415, 54 S. Ct. 487, 78 L. Ed. 882; *Stuthman* v. *United States,* 8 Cir., 67 F. 2d 521, 523.

The importance of this question of due process in trial procedure can best be seen when the lack of uniformity of the Criminal Procedure Rules of different

states are viewed. Under some state statutes and rules an opening statement is required or mandatory. *State* v. *Stahl,* 107 S. 2d 670, 236 La., 362; *People* v. *Clayton,* 211 N. W. 42, 236 Mich. 692; *State* v. *Deppe,* 286 S. W. 2d 776. In other states an opening is not required. *People* v. *Gomez,* 283 P, 2d 949, 131 Colo. 567; *People* v. *Arnold,* 250 P. 168, 199 C. 471.

Omissions *cannot* be supplied by the Trial Court. The Trial Court cannot be impartial and dispassionate if it supplies omissions on the part of the prosecution and when doing this gives an appearance of advocacy. *Archer* v. *Port Clinton,* 35 Ohio App. 2d 88, 215 N. E. 2d 707. In a trial by jury, the judge is not a mere moderator but is the governor of the trial for the purpose of assuring its proper verdict and it's function is to conduct the trial in an orderly way with a view to elicit the truth and attain justice between the parties; the Judge must always be calmly judicial, dispassionate and impartial and should sedulously avoid all appearances of advocacy. *United States* v. *Hickman,* 592 F. 2d 931 Ky. (1979).

C. THE OPINION BELOW CONFLICTS WITH DIETRICH; ROSE, WEBB, AND ROBLES AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

In *Lickliter* v. *Commonwealth,* 60 S. W. 2d 355 (1933) the office of an opening statement was permissive, however the reading of the indictment was mandatory. If the clerk or the Commonwealth's Attorney failed to read the indictment to the jury then it was

grounds for reversal. *Farris* v. *Commonwealth,* 111 Ky. 236, 23 KLR 580, 63 S. W. 615 (1901). When Kentucky adopted the Rules of Criminal Procedure (effective January 1, 1963), these new rules abandoned this requirement. The Criminal Code of Practice § 220 provided as follows: "The attorney for the Commonwealth *may* then state to the jury the nature of the charge against the defendant and the law and evidence upon which he relies in suport of it." In the process of transition to RCr 9.42(1) the word "may" became "shall".

> "The attorney for the Commonwealth *shall* state to the jury the nature of the charge against the defendant and the law and evidence upon which he relies in support of it."

Statutory instructions, KRS 446.080 deems the word "shall" in all statutes as meaning mandatory not permissive.

It is well settled that a "jury must be fairly apprised of the nature of the charges against the defendant." *Robles* v. *United States,* 9 Cir. 279 F. 2d, 401, 403 (1960). Some statement informing the jury of the nature of the charge is fundamental and indispensable otherwise, as the Court suggested in *Galloway* v. *Commonwealth,* 5 KLR 213, 11 Ky. Op. 951 (1883), it cannot be assumed that the jurors "comprehend the issue they are sworn to well and truly try." In *Calhoun* v. *Commonwealth,* 378 S. W. 2d 222 (1984) which Kentucky's Supreme Court cites, the indictment was read by the Commonwealth in lieu of opening state-

ment which sufficed however in the case at hand, the Judge read the indictment to the veniremen. The Kentucky Supreme Court has held that if the trial Judge reads the indictment to the jury pool before voir dire that is sufficient so then the trial can commence without even giving an opening even though one is required under RCr 9.42(a). Does the Judge *now* supply the missing parts so the Commonwealth can meet its burden of proof? Kentucky's highest Court has apparently held that the Judge can even though Federal Courts have held that he "must avoid all appearances of advocacy". *United States* v. *Hickman,* Ky., 592 F. 2d 93 (1979).

D. THE OPINION BELOW CONFLICTS WITH DECISIONS IN MANY STATE AND FEDERAL JURISDICTIONS.

Neither the Attorney General nor the Courts below relied upon a single non-Kentucky authority. Numerous Courts have dealt with this situation and have reached results directly opposite to that reached below.

In *People* v. *Kurtz,* N. Y. 414 N. E. 2d 699 (1980), the prosecutor as in the instant case, gave an opening statement which was a brief summary of the evidence and a list of the witnesses and failed to delineate any particular offenses or how the offenses were to be proven. The New York Court of Appeals ruled that the prosecutor failed to satisfy the statutory requirement that the prosecutor make an opening statement to the jury. Further, an overwhelming majority of Courts faced with motions to dismiss because of the inadequacy of the prosecutor's opening statement feel

the motion should be denied unless two tests are met. The two tests are 1. that it is clearly apparent from the opening statement that the defendant cannot be lawfully convicted and 2. then only after the prosecutor has been made aware of the difficulty and fails or is otherwise unable to correct it. (See, e.g., *Hanley* v. *United States,* 5 Cir., 416 F. 2d 1160, Cert. den. 397 U. S. 910, 905 S. Ct. 908, 25 L. Ed. 2d 91, *United States* v. *Dietrich,* 10 Cir., 126 F. 676. *Chatman* v. *State,* 164 Ind. App. 97, 326 N. E. 2d 839; *State* v. *Gray,* 423 S. W. 2d 776 (Mo.) In Petitioner's case, the prosecution was made aware and failed to correct. The Commonwealth failed to state with sufficiency any charge.

People v. *Kurtz, supra,* further held that because the dismissal was permissible, because "the defendant, by deliberately choosing to seek termination of the proceeding against him on the basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause". *United States* v. *Scott,* 437 U. S. at pages 98-99, 98 S. Ct. 2187; cf. *People* v. *Bailey,* 47 N. Y. 2d 965, 419 N.Y. S. 2d 956, 393 N. E. 2d 1029.

Petitioner submits that the conflict between Kentucky and these and other state and federal jurisdictions is another important reason for this court to grant review.

CONCLUSION

The present case presents the essential, yet still unclear, constitutional question of who in a trial proceeding *must* apprise the tryers of fact, the jury, of the charges facing the defendant. Who has the burden to show a crime has been committed and committed by the defendant. For the reasons stated above, a writ of certiorari should be issued to review the opinion of the Supreme Court of Kentucky.

Respectfully Submitted,

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APPENDIX

APPENDIX

OPINION RENDERED: MAY 2, 1986; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 85-CA-2210-MR

JIMMIE L. BEASLEY - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Hardin Circuit Court
Honorable William S. Cooper, Judge
Action No. 84-CR-94

REVERSING AND REMANDING

BEFORE: CLAYTON, LESTER, and REYNOLDS, JUDGES.

CLAYTON, JUDGE. Jimmie L. Beasley appeals from a judgment of the Hardin Circuit Court sentencing him to concurrent sentences of imprisonment of five, ten, and eight years based upon his trial and conviction on charges of first-degree sexual abuse, second-degree rape and second-degree sodomy. Now on appeal, Beasley argues that the trial court denied him his constitutional right to due process: 1) By denying him the opportunity to introduce testimony that the victim, his 16-year-old step-daughter, once reached into a boy's pocket to remove a rabbit's foot he had taken from her, 2) By refusing to direct a verdict of acquittal following the opening statement of the Commonwealth, 3) By allowing his conviction without adequate evidence of his guilt, 4) By permitting inflammatory statements and personal expressions of opinion to be made dur-

ing the Commonwealth's closing argument; and finally, 5) By abusing its discretion by denying his motion for probation.

On October 1, 1984, appellant was indicted by the Hardin County Grand Jury. By its three counts, the indictment charges first that Beasley, from 1976 through 1981, committed first-degree sexual abuse upon Jessica Decker, by having sexual contact with her when she was less than 12 years of age. Count II charges the appellant with committing second-degree rape upon Jessica in the spring of 1982 when he had sexual intercourse with her when she was less than 14 years of age. Count III, the final count, charges Beasley with committing the offense of second-degree sodomy on or about the period from 1976 through 1981 by engaging in deviate sexual intercourse with Jessica when less than fourteen years of age.

On April 19, 1985, trial was begun, the assistant county attorney acting as special prosecutor. Voir dire was had, during which time the indictment was read to the veniremen by the trial court. Following selection and empanelment of the jury, the Commonwealth gave its opening statement. In effect, that statement sets out only that the charges ar sexual abuse, sodomy and rape and that the victim will testify along with a social worker who will testify about "sexual abuse of children." No further reference to the charges, or the evidence to be introduced in support of them, was made. At the close of the statement, defense counsel objected requesting a directed verdict of acquittal, "as the prosecution made no indication whatsoever of what it intends to prove, or will prove." Following an inchambers hearing, the trial court denied the defendant's motion, but conceded that defendant had a "very good issue on appeal." We agree, and are reluctantly compelled to reverse and remand the judgment of the Hardin Circuit Court based upon the Commonwealth's failure to comply

with RCr 9.42(a). As for the remaining issues raised on appeal, we need not devote extended discussion to them other than to observe that we believe them to be without substantial merit.

Criminal Rule 9.42(a) expressly provides that,

> The attorney for the Commonwealth *shall* state to the jury the nature of the charge and the evidence upon which he relies to support it;
>
> (our emphasis).

While appellate judicial authority interpreting the current version of this portion of the rule is sparse, the case law in existence indicates that "some statement informing the jury of the nature of the charge is fundamental and indispensible." *Calhoun* v. *Commonwealth,* Ky., 378 S. W. 2d 222, 224 (1964) (citing *Galloway* v. *Commonwealth,* 5 K.L.R. 213, 11 Ky. Op. 951 (1883)). In *Calhoun,* appeal was taken from a conviction of voluntary manslaughter based upon the failure of the Commonwealth to do no more than read the indictment during its opening statement. Pointing to the statutory reference to stating the evidence found in RCr 9.42(a), Calhoun argued he was prejudicially surprised by evidence later introduced at trial given the state's failure to make reference to it during opening statement. Rejecting this argument, the Court instead held that the reading of the indictment to the Jury, although not required under the present rules, was adequate to satisfy the requirement that the jury be apprised of the nature of the charge and the evidence relied upon to support it. *Id.* at 224.

Therefore, while a statement of the evidence is not mandatory, the jury, as opposed merely to the veniremen of the jury pool, must be made aware during the opening statement by the Commonwealth of information of a nature

such as that contained in the indictment. In this respect, it cannot be assumed that the jurors "'comprehend the issue they are sworn to well and truly try.'" *Galloway,* 5 K.L.R. 213, 11 Ky. Op. 951 (1883). Hence, the office of an opening statement by a prosecuting officer is to state the nature of the charge against the defendant and the law and evidence relied in support of it to prepare the minds of the jurors for evidence to be heard. *Mills* v. *Commonwealth,* 310 Ky. 240, 220 S. W. 2d 376 (1949); *Turner* v. *Commonwealth,* Ky., 240 S. W. 2d 80 (1951); *Sheppard* v. *Commonwealth,* Ky., 322 S. W. 2d 115 (1959). The Commonwealth having failed to do more than state the statutory designation of each charge and the names of its witnesses, failed to comply with RCr 9.42.

Accordingly, the judgment is reversed and remanded for retrial.

ALL CONCUR.

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Attorney for Appellee:

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RENDERED: APRIL 2, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 86-SC-386-DG

COMMONWEALTH OF KENTUCKY - - - *Movant*

v.

JIMMIE L. BEASLEY - - - - - *Respondent*

On Review from the Court of Appeals
No. 85-CA-2210-MR
(Hardin Circuit Court No. 84-CR-94)

MEMORANDUM OPINION OF THE COURT REVERSING

Respondent Beasley was indicted for and found guilty of first-degree sexual abuse, second-degree rape, and second-degree sodomy. The case was called for trial in April, 1985. The clerk called the roll and ascertained the presence of the entire panel, and the veniremen were sworn to make true and correct answers to such questions as might be asked them on voir dire. At this juncture, the presiding judge, Hon. William S. Cooper, introduced the defendant and his attorney and then proceeded to thoroughly describe the contents of and charges contained in the indictment. He further informed the jury that the defendant had entered a plea of not guilty to these charges, that he was presumed innocent until proven guilty beyond a reasonable doubt, and admonished the jury that "the in-

dictment is not evidence against the accused, and affords no inference of his guilt."

During voir dire, the prosecutor sought to again read the indictment, but the defendant objected on the grounds that "the charges had been read and the court had admonished the jury." This objection was sustained. After the 12 jurors were empaneled, the prosecutor made a brief opening statement in which she again stated the charges, the name and age of the victim, the name of an expert she intended to call, and the fact that the victim was the only eyewitness to the crimes. Thereafter, counsel for Beasley moved for a directed verdict of acquittal on the ground that the opening statement was insufficient under RCr 9.42(a), which reads: "The attorney for the Commonwealth shall state to the jury the nature of the charge and the evidence upon which he relies to support it."

The trial judge denied the motion, stating "If it's going to be thrown out on that kind of technicality, the Court of Appeals will have to do it." The Court of Appeals promptly accommodated Judge Cooper, and reversed the conviction.

The principal reason given by the Court of Appeals was the case of *Calhoun* v. *Commonwealth,* Ky., 378 S. W. 2d 222 (1964), in which this court held that a reading of the indictment by the prosecutor after the jury was empaneled was sufficient without any opening statement. The question presented in this case never arose in the *Calhoun* case, where the indictment was read by the judge before the final 12 were sworn to try the case.

It is the opinion of this court that the Court of Appeals totally ignored the language of *Calhoun, supra,* at p. 224, in which this court stated:

> Since we have concluded that RCr 9.42 was not intended to more than preserve the necessity of appris-

> ing the jury of the nature of the charge, it follows that a statement of the evidence is not mandatory, even though a blindly literal construction would make it so. That such a construction would lead to an entirely impracticable result is an additional basis for our determination that it was not so intended.

We are cited no case requiring that the indictment be read by the prosecutor himself, or stating that the reading of the indictment by the judge is not sufficient, or at what interval it should be read. However, it is manifestly clear that the procedure utilized here—viz., the reading of the indictment by the judge and the opening statement itself by the prosecutor—not only apprised the jury of the charges but also included a statement of the evidence. We would even note that the respondent objected to the reading of the indictment by the prosecutor.

The Court of Appeals is reversed, and the judgment of the Hardin Circuit Court is affirmed.

All concur.

Attorney for Appellant:

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Frankfort, KY 40601

DAVID A. SMITH
Assistant Attorney General

Attorney for Appellee:

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Elizabethtown, KY 42701

HARDIN CIRCUIT COURT

NINTH JUDICIAL DISTRICT
DIVISION 1

Case No. 84-CR-94

August Term A.D., 1984

The Commonwealth of Kentucky
Against
Jimmie L. Beaslie

_____	Sexual Abuse First Degree
_____	Rape Second Degree
_____	Sodomy Second Degree
	CHARGE
_____	K.R.S. 510.110
	K.R.S. 510.050
	K.R.S. 510.080

The Grand Jurors of the County of Hardin, the name and by the authority of the Commonwealth of Kentucky, charge:

Count I: That on or about the period from 1976 through 1981, in Hardin County, Kentucky, the above named Defendant committed the offense of Sexual Abuse First Degree when he did have sexual contact with Jessica Decker, a person less than 12 years of age.

Count II: That on or about the Spring, 1982, in Hardin County, Kentucky, the above named Defendant committed the offense of Rape Second Degree when he had sexual intercourse with Jessica Decker, a female less than 14 years of age.

Count III: That on or about the period from 1976 through 1981, in Hardin County, Kentucky, the above named Defendant committed the offense of Sodomy Second Degree by engaging in deviate sexual intercourse with Jessica Decker, a person less than 14 years of age.

Against the peace and dignity of the Commonwealth of Kentucky.

WITNESSES: Jane McCormack

Jessica Decker

_____

_____

_____

A TRUE BILL

(s) John C. Roseberry

Foreman

October 1, 1984

Bond $_____

Stand on Bond $_____

Summons Indictment _____

(s) Wm. S. Cooper
Judge, 9th Judicial District

RECEIVED, from the Foreman of the Grand Jury, in their presence, and filed in open Court.

ATTEST: David Owsley, Clerk
Hardin Circuit Court

(s) By: Judy Boone, D.C.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JIMMIE L. BEASLEY - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

NOTICE OF APPEARANCE

* * * * * * * *

The Clerk will enter my appearance as counsel for Petitioner. I certify that I am a member of the bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

PHYLLIS K. LONNEMAN
204 N. Mulberry St.
Elizabethtown, KY 42701
(502) 765-2190

Counsel for Petitioner

No._____

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CERTIFICATE OF SERVICE

* * * * * * * *

I, Phyllis K. Lonneman, counsel for Petitioner, certify that the attached Petition for Writ of Certiorari, Appendix, and notice of Appearance was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and to Counsel for Respondent, Hon. David Smith, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 1st day of June, 1987, by personally depositing same in a United States mail box, first-class postage paid.

SUBSCRIBED AND SWORN to before me by Phyllis K. Lonneman on this 1st day of June, 1987.

Phyllis K. Lonneman

Notary Public

PHYLLIS K. LONNEMAN
Attorney at Law
Member, Bar of the
United States Supreme Court

My Commission expires: 8-14-87